

BRENDAN BROWN LECTURE: CRITICAL LEGAL STUDIES AS A TEACHING METHOD

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The movement known as Critical Legal Studies (CLS) has reached a strange juncture in its journey out of obscurity into the glare of intense, if usually rather distorting, publicity. In some of its public appearances, CLS seems to be wildly in fashion among legal intellectuals, often mentioned in the same breath as "law and economics," as an intellectual movement that is transforming the study and teaching—and who knows? maybe someday the practice—of law. It has become an established faction, or interest group: when there's a conference on constitutional law, or a series of lectures on new theoretical perspectives, a place is set at the table for at least one Critic. And indeed much of the first wave of CLS work is being absorbed, if anything altogether too painlessly, into mainstream legal scholarship by law teachers who are not Critics themselves but have found some of its work illuminating.

Thus far it's a familiar story: the upstart makes a reputation by shocking the salon with his audacious radical crudities, then is accepted into polite society. At the same time there's a darker and more painful side to the story of the emergence of CLS as a political-cultural phenomenon. It has provoked a public counter-response of unprecedented venom. Some of the responses are simply mindless Red-baiting, but some are more informed yet take the form of vicious and intensely personal attacks on the conspicuous figures of the movement, notably Duncan Kennedy and Roberto Unger. Much more important, there has been a far less visible and more sinister counter-reformation directed against younger law teachers who have shown any interest in CLS or feminist or other scholarship heterodoxies. In the last year, several of them—very talented and productive people indeed—have been denied tenure; and younger ones who will face tenure decisions soon are being advised even by friendly and well-meaning colleagues to avoid the taint of association with Critical or feminist ideas. Critics have

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learned to their cost to warn their students who are looking for teaching jobs not to use them as references. Meanwhile, inside the movement, CLS has been going through rocky times: it has been trying to become both a more inclusive movement to deal with the charges that at least its early manifestations had little to offer, and owed too little to the insights of the scholarship and political concerns of feminists and minorities; and to produce some highly concrete specific and programmatic work in response to the charge that it was too academic and theoretical to be of any use.

CLS is really many things—a broad organizational umbrella for a loose, ungainly coalition of left-wing teaching and practicing lawyers; a form of law school politics; a miscellaneous collection of legal theories; and a name for some distinctive methods of social and doctrinal history.

What I'd like to talk about today is CLS—or rather, because CLS is many things to many people—my version of CLS, in one of its guises, that is, as a method of teaching law.

The guiding assumption behind CLS teaching is this: that the conventional forms of legal discourse—meaning, the normal everyday ways lawmakers and administrators, judges, legal scholars, practicing lawyers, and law teachers talk about and analyze social life and the role of law in regulating social life—are political practices, and furthermore practices with unnecessarily conservatizing social effects upon the minds of the people who engage in them. To put this another way, the assumption is that even people with an idealistic or reformist social agenda who come to law school, become lawyers, and are socialized into the system, come to believe that there is something natural, inevitable, and necessary about the social status quo. Among the many forces, political and economic, that reinforce the status quo, there is a densely woven web of cultural assumptions wrapped around legal discourse that say to lawyers: you cannot be a professional, you cannot be a realist, you cannot faithfully serve your clients and the premises of the legal system and at the same time hope to contribute to any kind of progressive and transformative politics that would help to make this a more democratic and egalitarian society. The lessons lawyers learn from their practices are, in a phrase or two, lessons of false legitimation, false necessity. They learn that the way things are in society is about as good as they can be; and to the extent that they are not, they can be fixed through marginal shifts in conventional arrangements—a little more or a little less regulation. Otherwise

things are okay, and if they are not, nothing can be done about it without leading to economic inefficiency, totalitarian regulation, or just expensive futility, a lot of bother for bad results, or no results. More than anything else, CLS is just a set of techniques—a bag of fleas—with the mission of trying to shake this state of mind out of its glum complacency.

So one can think of CLS as a movement in jurisprudence, or as a movement in social theory. But I think it is somewhat more useful to think of it as it began, as an episode in the history of American legal education, as a bundle of critiques directed against some very specific practices—the theories, doctrines, teaching methods, social assumptions, and cultural mannerisms that had by the 1950s and '60s come to prevail in the American legal-educational establishment.

THE POST-REALIST COMPROMISE: THE METHOD OF THE 1950s AND 1960s

I remember the regime of practices pretty well because it was the regime in effect when I went to law school in the later '60s. It was a regime heavily influenced by the critical liberal movement known as Legal Realism, but a very tamed and chastened Legal Realism, with the most critical parts of its agenda left out.

In post-1945 American teaching—pioneered by legal academics possessing little regard for the average run of judges, and tending to identify professionally with those select judges and legal policymakers who pride themselves on *seeing through* conventional legal rhetoric (Holmes, Brandeis, Cardozo, Hand, Traynor, Harlan, Friendly)—the cases are treated chiefly as material for criticism, as largely inept or confused attempts to deal with the underlying issues of fact and policy; or else simply as storehouses of factual examples. The teacher takes the relatively formal, general sentences of the opinion, which beginning students rely on as stating the rule or principle, and leads his class by interrogation—hypotheticals slightly varying the facts—to see that the rules as stated cannot be generalized very far without leading to absurd or contradictory results; that they assume a hidden paradigmatic case situation, and are at best intended to serve the functional needs of that situation and cannot be transferred to deviant contexts without causing trouble. The student learns very early on how cases can be reconciled by formulating their holdings broadly

and distinguished by narrowing to contextual particulars. Over and over again, the teacher interrogating a student will ask if a rule designed for the factual setting of a prior case is appropriate for the next one. My Contracts teacher, Lon Fuller, was a master of this kind of situational variation: the challenge in his class was to locate in each case the crucial fact—there was only one per case, and it was often quite obscure, maybe buried in a footnote or brought out only in a dissenting opinion—that gave the clue to how policies and equities should be balanced in that case. “The insurance company had a resident agent in Oklahoma City. What does that tell you?” It told you, as I recall, that the company could at small cost have investigated and discovered the fraud, and thus perhaps should have to bear the risk of loss on the contract.

Realist teaching prides itself on seeing through conceptualist legal argument—to the concept that all law is grounded on considerations of policy. Yet, legal classification is determined by its consequences. For example, the question, “Is an advertisement an offer?” can only be answered by looking at what results might follow from labelling it thus and asking if they seem to be desirable ones. Yet, out of relentlessly hammering skepticism comes the possibility of order. The order suggested is that of the immanent functional rationality of the legal system. The key skill is to locate the core set of functional interests—in efficiency, fairness, or whatever—underlying the formal categories of the cases (for example, offer-and-acceptance, consideration doctrine, mistake) and to suggest how, in each particular configuration of facts, an ad hoc balancing might be accomplished. Virtually every rule of law that exists, simply because it exists, may be rationalized as serving some policy.¹

Yet the underlying order thus suggested, or wistfully hinted at, was deliberately undertheorized for a good reason: it was really quite incoherent. Legal rules, it is assumed, are designed to serve policies and purposes or to adjust competing interests; but the policies and purposes and interests hypothesized are wildly miscellaneous and often in conflict with one another: we want to promote the security of transactions, protect reliance interests, encourage

1. I am dwelling disproportionately here on the (relatively) intellectually exciting moments in the classroom, the moments when the policies behind the doctrines were on the agenda—to be explained, justified, and argued about. Most of what went on was just drill in the rules—questions designed to elicit recitations of facts, statements of doctrinal rules, and practice in applying the rules to hypothetical situations.

good faith dealing, free up resources for allocation to their highest uses, allocate risks to those in the best position to bear them, and compensate for bargaining inequalities, to name a few. We also, it seems, want to give these interests and purposes different weights, strike a different balance among them all as we move from case to case; though, of course, it is also important, for the sake of horizontal equity and administrative simplicity, to try to preserve consistency of rules and principles across cases. The teacher would sometimes elicit from a student one or two policy rationales for a decision and then cross him up by proposing one or two opposing ones. So haphazard was the jumble of rationales that you could never hope to guess which ones, in what combination, aggregated together or traded off against one another, would be implicated in any particular case. All you really could be sure of was that the *existing* regime of rules—or, more accurately, a mildly reformed version of them, adjusted here and there to accord with emerging policy trends—would magically, providentially, turn out to be the optimal regime.

The great Socratic teachers of the post-Realist generation never told you what they thought, never offered their own synthesis: enlightenment was for the pupil to discover, each in his own arduous way.² Some of these teachers were quite cynical about the actual products of the legal system, its statutes, decisions, administrative rulings; but their ironic treatment only served to highlight the implied presence of a Platonic ideal order of closely reasoned law-as-policy-analysis, of which people as smart as themselves and their very best students, were or could become the masters.

Any notion of error presupposes a system of truth from which it deviates, and my teachers were often Romantics beneath their ironic surfaces. There were also among them some whom one might call disintegrated Realists—men who had long since lost any

2. I have checked my experience against that of others in my generation by asking colleagues around my own age what their own teachers' *substantive* views were of their subjects. I find that with rare exceptions none of these ex-students can recall anything that any of their teachers actually said about contracts or torts or procedure, much less reconstruct their general approach. This is rather extraordinary if you compare law with any other field. Economists ten or twenty years out of school, especially those who have become teachers themselves, have no trouble remembering whether their teacher was a monetarist or Keynesian or Marxist and can usually tell you quite specifically what doctrine he taught about the relationship between inflation and unemployment. A teacher of economics or evolutionary biology or history or literature, especially at the graduate level, is expected to have and develop through her teaching and writing a theory or at least a set of views about her subject, and to defend it against rival theories.

faith that the legal system made much sense, who delicately picked it apart for the savage fun of the exercise without suggesting any pattern beneath the muddle. But even these men attributed a kind of autonomous, as it were existential, value to sheer pyrotechnical agility in doctrinal argument and analysis.

At a deeper level still, below the dazzling word games and cynical poses, below even the Platonic or Romantic ideals of perfectly analyzed cases, there was a deep, unruffled complacency about the legal order as it stood. One of the mysteries of the method of legal education I am describing is how it quite effectively manages to inculcate the conventional culture of legal decision making at the same time as it presents law as a jumble of incoherent policies.

What had been mostly lost by the generation of 1950s private law teachers was the urgent sense of the 1920s and '30s. Realize that the issues raised by the common law cases were also the great *contested* issues of morals and political economy: issues of the practical meanings of freedom and coercion, of allocation and distribution, of the shifting of burdens and sharing of benefits, of the extent to which law should facilitate the pursuit of self-interest or limit self-interest in the service of basic conditions of community, or should treat collectives like corporations, families, cities, unions and the state as threats to individual autonomy or collectives for pursuing shared purposes.

One might have thought that men who in the 1930s had broken with legal tradition and made new policy, while the orthodox corporate bar attacked them as Socialists, would have stressed in their teaching the combative and political elements in lawmaking and application. They turned out instead to be more interested in consolidating their revolution as the new established wisdom. Once statutes had pulled out the most contentious issues, the common law subjects could gradually revert to their curious and paradoxical status as lawyers' law, deriving prestige and authority from seeming relatively removed from vulgar social struggles, capable of being ideologically central to professional identity precisely because they were politically marginal. Any big questions they raised could be—and were—punted to the black box of the "legislature" for resolution, and thereby banished from the domain of legal argument. Meanwhile the public law subjects, the New Deal statutes, were taught no longer as embodying and responding to social struggles, but as having resolved them. Mildly progressive taxation, labor regulation through supervised collective bargaining and

grievance arbitration, and administrative discretion under broad delegations patrolled at the perimeter by judges were accepted principles. The legitimacy of big business was accepted too, as were trade unions in their proper sphere. In the Antitrust course, all traces of the moral and social critiques of corporate concentration produced by sixty years of populist agitation had disappeared, save as straw positions to be briefly and casually dismissed as economic folly.

Meanwhile, the rapid accretion of cases interpreting every section of the statutes made it easy to displace attention from the struggles underlying the statutory regimes to doctrinal exegesis. The Cold War and Red Scares of the 1950s doubtless also encouraged this depoliticizing of legal doctrine.³ By the time I got to law school in the late 1960s, the only general perspective on the legal system was that imparted in the famous Hart & Sacks Legal Process course, which so took for granted a basic consensus on substantive social goals served by the legal system that the sole criterion left by which to evaluate legal decisions was whether they had been made by the appropriate institutions following the correct procedures. Only constitutional law, convulsed by the Warren Court's resurrection of the civil rights agenda of radical reconstruction, was an acknowledged battleground of contending forces and beliefs.

CONTEXT, POLICY, AND CONFLICT—DECLINE AND REVIVAL

In the late 1960s, the more ambitious Realist projects began to revive. The first revival came from the liberal left, inspired by new social movements in which law students were becoming involved and were pressuring their schools to recognize in the curriculum. Some examples include black civil rights, welfare rights and legal services for the poor, the women's movement, consumerism, and environmentalism. The schools responded by adding a battery of

3. I recall that in the Harvard Law School of the 1960s, the throbbing center of the mystery, the holy of holies, the relative mastery of which would fix forever the aspirant's exact position in the priestcraft of lawyers, was the series of cases elaborating what is known to students of American federalism and civil procedure as the *Erie Doctrine*. This is the doctrine that federal courts hearing disputes between citizens of different states must apply the law of the forum. The doctrine is technically very complex, though it had not been since the 1890s of much practical importance, and was always trembling on obsolescence because Congress periodically threatened to abolish federal jurisdiction over such cases altogether.

courses in urban law, poverty law, race and sex discrimination, environmental law, and the like, and these proved a great boost to context, policy, and clinical approaches to teaching.⁴ Though mostly confined to small seminar and clinical ghettos in the second and third year, and often viewed with some contempt by the "hard" teachers and students of business law as a degraded form of social work, these subjects acquired a modest vogue. Thanks to the prevailing faith in *courts* as instruments of social reform, a faith inspired by the Warren Court and activist judges like Traynor, Francis, and Wright, who were busily promoting expansion of common law sellers', manufacturers', employers', and landlords' liabilities, the revival even trickled down onto the bedrock doctrinal subjects of the first year. Civil Procedure could now be taught partly as a law reform litigation course with materials on class actions and complex injunctions. Property expanded its treatment of landlord-tenant relations and land-use planning; Contracts of unconscionability in consumer transactions; Torts of products liability.

Ultimately, it was the liberal trends in legal regulation of 1964-70—the statutes and constitutional decisions on race and gender discrimination; judicial intrusion into administration of schools, welfare, prisons, and mental institutions; the creation of vast new federal powers and agencies to regulate the environment, occupational health, and consumer transactions; the expansion of common law civil liabilities—and the theorizing and teaching that had grown up around these trends in the legal academy that proved the undoing of the unspoken political consensus underlying postwar doctrinal teaching. Though proponents and defenders of these reforms have become the new liberal center of academic law and probably account for the majority of American law teachers under fifty—consider, for instance, the overwhelming opposition of law teachers to the nomination of Robert Bork—they have never established anything like the hegemony of the post-New Deal consensus. Instead, the reforms touched off fierce criticisms from both the left and the right.

One mode of critique revived the Realist interest in social context, in the form of empirical studies of the effectiveness of legal

4. For reasons I have never entirely grasped, tradition-minded lawyers who generally resist social science are much less hostile when it is brought to bear on legal problems of the disadvantaged. Criminology is a legitimate (if very marginal) subject in law schools in a way that, for example, Sociology of Business Organizations is not.

regulation. From the left, relatively speaking, scholars writing for the *Law and Society Review* registered a growing disillusionment with liberal reforms: regulation designed to benefit the weak, they depressingly concluded, actually benefits the powerful; it is ineffective; it gives a patina of legitimacy to reforms that change nothing; it sometimes actually harms its presumed beneficiaries. From the right, contributors to the *Journal of Law and Economics* mostly agreed with the diagnosis of regulatory failure, though of course their cure was to give up on regulation and return to markets rather than press for more radical reforms. Yet, if there is one universal constant in human history, it is that you can never get most law teachers to take much interest in how law actually works; so the revival of social research in law thus far has not influenced law teaching much outside of a few specialized fields.

What really has had an influence, and a deep and far reaching one at that, is not the empirical brand of law-and-economics, but the theoretical brands pioneered by Posner and Landes at Chicago and Calabresi and later Williamson at Yale. So far the direct influence has been confined mostly to elite law schools, such as Chicago, Yale, Stanford and Virginia; my impression is that most of the teaching, as of the practicing profession, still looks on law and economics with beady eyes as suspiciously nonlawyerly. But its spread now seems inevitable; for in subtle disguises, unladen with graphs and jargons, it has invaded some of the major casebooks and textbooks,⁵ not to mention the opinions of law professors that President Reagan placed on the federal bench and in the administrative agencies; and new law teachers, who overwhelmingly come from elite schools, will all have had some exposure to it. One major doctrinal field after another is gradually being reorganized around some vulgarized version of the paradigm of law as an efficiency-promoting mechanism whose primary role is to facilitate joint-maximizing social interactions by reducing their transaction costs: contracts as a set of standardized state-provided gap-filling rules allocating risks as the parties would have done if they had bargained over them; torts as a means of assigning liability to the cheapest-cost-avoided; property as a means of allocating rights to their highest-valuing users; corporations as a network of contracts designed to lower agency-monitoring costs; and so forth. (That is the pure version. In the center-left, or Yale, or Calabresi-Acker-

5. See, e.g., R. CLARK, *CORPORATE LAW* (1986) and T. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986).

man-Kronman version, these "efficiency" concerns are never allowed completely to dominate private law decision making, but must be traded off against concerns of "fairness" and distributional equity.)

For all the well-known weaknesses of the law and economics school—its absurd psychology and historical and philosophical illiteracy, its insular insistence on a primitive positivism as the only valid form of social knowledge, its pose of brutal realism about self-interest that masks a curious naiveté about power and conflict—it has vastly improved the conduct of legal discourse. For one thing, it has helped to reunify what had become a very fragmented doctrinal universe: its categories cut across private and public law and across the private law categories of contract, tort, and property. Most important, it has actually tried to fulfill the Realist project of reformulating doctrine on a theory of legal policy of the social functions that law is supposed to perform—a theory that would work as a theory, not just as a set of ad hoc rationalizations of the decided cases. And in the process it has helped to reconnect legal analysis with many, though still too few, of the classic problems of morals, social theory, and political economy.⁶

I remember the excitement that I and many other people in my cohort felt when we started reading the early work in this field—Coase on the firm and on social costs, Michelman and Ackerman on takings, Calabresi and Melamed on property rights, Posner's theory of negligence, Goetz and Scott on contract remedies and relations, and Williamson on markets and hierarchies, to name several. Some of it seemed dazzling, some perverse, wrongheaded, oppressive, and reactionary; but even the worst stuff was at least *about* something real and important and had some palpable intellectual content. Unlike the maddeningly elusive postwar games of doctrinal analysis and ad hoc armchair policy invention, it was something you could sink your teeth into. Moreover, because the most popular version was the Chicago right-wing version, it was politically controversial. The liberal center suddenly had to defend its political presuppositions instead of simply assuming them as the common sense of the legal system. Law and economics served as a sort of Marshall Plan for legal-doctrinal scholarship. It rebuilt a devastated country into terrain worth contesting.

6. Rawlsian moral philosophy tried to do the same thing, but it never gave as powerful a leverage on analyzing doctrine as law and economics did; it remained in the jurisprudence ghetto as a "perspective" on law, rather than a method of doing law.

ENTER CLS

CLS is basically a movement of legal intellectuals, originating in intellectual quarrels with their own legal education. Most activist students of the 1960s who were involved in radical or left-liberal politics found the studiously antipolitical teaching of that time simply irrelevant to their concerns. They scrounged such slim practical pickings from law school as they could, got the degree, and moved on. But the 1960s law students who went on to form the core of CLS mostly became teachers themselves and so were motivated to engage with the content and style of orthodox doctrinal teaching and scholarship. I think perhaps the first authentic piece of CLS scholarship was a book-length essay that Duncan Kennedy wrote as a second year student at Yale, taking apart the Hart & Sacks Legal Process materials.⁷ It was followed, in this first and almost wholly negative and critical phase of CLS, by several more such attacks on the conventional reasoning modes of ordinary doctrinal scholarship, as well as by attacks on some of the more general unexamined background presuppositions of legal argument, such as the ideology of adversary advocacy and the underlying Whig history of the progressive evolution of legal institutions. In the process, the CLS writers rediscovered the early scholarship of Realism—not the relatively uninteresting Realist general jurisprudence or theories of judicial decision making, but the substantial Realist scholarship on torts, contracts, bankruptcy, conflicts, trusts, property, and so forth, in which the Realists had trashed their own elders.

Later, as law and economics gradually articulated its theories of legal policy, solidifying the utilitarian bases of legal doctrine into targets worth shooting at, CLS began attacking those as well.⁸ CLS also produced—in what with my legal-historian's bias I tend to think is among its best work—about a dozen intellectual histories of doctrinal fields, such as tortious interference with contracts and spendthrift trusts.⁹

7. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (10th ed. 1958).

8. The best treatment by far of the middle-level doctrinal and policy critiques of CLS is in M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).

9. See, e.g., Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985); Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101 (1986); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209 (1979); Mensch, *The Colonial*

In its most recent phase, CLS writers have turned to more constructive projects, trying to suggest how leeways and opportunities in the legal system might be strategically exploited in the service of progressive politics.¹⁰ I have gone into some detail to mention this critical, historical, and constructive work on middle-level issues of doctrine and policy because, although such work is the vital core of CLS scholarship, it is almost never read and taken into account by most critics of CLS.

I would like to use the remaining space simply to describe in general terms how the CLS intellectual agenda has influenced the ways in which at least some of us teach law.

To begin with, I think that having a critical approach to your own legal system gives you at the outset an enormous *intellectual and pedagogical* advantage: you do not have to "rationalize" the legal system to your students—you do not have to try to defend most of its decisions and you do not have to explain most of it as making sense. You can help the students acquire the skills they need to understand how the system works and to function inside it as counsellors and advocates, without assuming the heroic, Herculean one might say, task of constructing it as a coherent system or as one having what Ronald Dworkin would call "integrity."¹¹ For perhaps the most central CLS tenet is that the legal system is not a single, integral system at all, but is a teeming jungle of multiple, overlapping, contradictory systems, each pregnant at every historical moment with multiple alternative interpretations, possibilities, trajectories of future development; each alternative being perfectly consistent with the system's operating premises and processing logics, but only a few of which, in any given moment, are actually selected for adoption. This is of course a fundamental point of dif-

Origins of Liberal Property Rights, 31 BUFFALO L. REV. 635 (1982); Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (1982); Weisberg, *Commercial Morality, The Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3 (1986).

10. See, e.g., Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553 (1987); Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83); and of course the massive project of ROBERTO MANGABEIRA UNGER, *POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* (3 vols., 1987); Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U.L. REV. 485 (1987); Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39 (1988); Simon, *Legality, Bureaucracy and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

11. See R. DWORKIN, *LAW'S EMPIRE* (1986).

ference between both CLS and Legal Realism (in Realism's constructive, technocratic mode) and CLS and law and economics.

I would like to supplement this account with a brief list of techniques the CLS teacher can use to bring home to his or her students the multiple alternatives of possible legal orders and the clues to the selection mechanisms that currently produce and reproduce the legal order that we are familiar with. Let me emphasize again that whatever insights CLS may have to offer into legal study are best taught not in a separate course of jurisprudence or legal theory, but in the ordinary process of teaching the regular law subjects.

The first technique, though very simple, can be surprisingly radical in its applications: in whatever subject one is teaching, start by making an inventory of its conventional argumentative moves. Conventional teaching imparts familiarity with these moves piecemeal, then draws very selectively from the total stock of moves in discussing each case. CLS teachers like to get all of the moves out on the table at the beginning—by eliciting them all from the class in discussing the first cases, or simply by reciting them all in a handout.

The next step is to try to organize one's stock of moves, by reducing and abstracting them, and then by arranging them in opposing pairs. An enormous amount of contract law argument, for example, can be organized around the opposing poles of the rhetorics of formality and informality. On the formal side, there are arguments for rules such as binary on/off decisions and privileging of formal signs of intention. On the informal side, there are arguments for standards such as good faith and reasonableness, requiring detailed particularized inquiries, decisions lying along a spectrum, little or no privilege for formal over informal evidence of intentions. Much argument can be organized around polar categories of neo-Hobbesian individual self-reliance—no obligations to others beyond those formally assumed, no protections for oneself beyond those formally recorded—*versus* neo-Durkheimian community—obligations to share gains, losses, and bargaining advantages that may arise out of relationships regardless of formal assumption. The CLS teacher also tries to unveil the backstage devices that are commonly employed in the manipulation of concepts like foreseeability or intent—devices such as moving time frames for rational choices back and forth, or constructing the desires of “reasonable men” and “women,” testators, legislators, trust settlers,

and contracting parties by reference to a few stereotypical traits or to much denser and more elaborate descriptions of personality.

Another teaching method, one I am particularly fond of, is, as the course moves forward, to compare and contrast how, in different subfields of doctrine, the courts draw differentially upon the common stock of devices. In contract law, for instance, it is always interesting to contrast the degree of discretion that courts are willing to give one party to police or judge the adequacy of the other's performance in franchiser-franchisee, employer-employee, and supplier-customer relationships. I also like taking up the body of contracts cases dealing with promises and relations between intimates and family members to show that much law is made by judges saying how fundamentally different such relations are from commercial ones (the technique of stereotyped contextualization) or how fundamentally similar (the technique of a contextual abstraction). This again is just a device for bringing out how social worlds are judicially constructed through how abstractly or concretely things are described and how they are stereotyped when described concretely.

Throughout the year one endeavors to get one's students to practice using the devices, over and over, as they learn them. With the moves clearly inventoried and organized, it becomes relatively simple, when a court or a student in a case under discussion makes one of the conventional doctrinal arguments, to get the class to supply the conventional counterarguments. (The process also, incidentally, helps students get a grip on the arguments and counterarguments being made in their other courses, whether or not taught by CLS types.)

Where doctrinal arguments seem inconclusive, the lawyer's usual next resort is to policy, or just "common sense." And so the CLS teacher's next move is to perform exactly the same operations on policy arguments: make an inventory, match arguments systematically with counterarguments, and display and catalogue the common artifices of manipulation. Here the new law and economics learning has proved invaluable, because it has already produced ready-to-wear off-the-rack concise, elegant, and usefully formalized versions of most of the common efficiency-based argumentative moves in the legal system, and because for each set of arguments there is generally a right-wing Chicago version and then a Yale

center-left version with which to counteract it.¹² This is a somewhat more complex enterprise, and CLS teachers have to decide whether to teach the more formal versions of the efficiency arguments or stick with the informal versions. Some give a little crash course in the relevant elementary economics right in the middle of the term. Some just try to teach the quick informal versions of the arguments. Sometimes it is enough simply to show that the validity of many commonly made and commonly accepted arguments depend upon elaborate empirical assumptions that are in the particular context quite implausible or would require extensive research that clearly nobody is going to do so that counterarguments based on equally-if-not-more plausible assumptions are likely to be just as valid.

So the basic method here is just to bring out the submerged premises, empirical assumptions, and narrative artifices; to elaborate them, get students to elaborate them; to show there is a limited number of basic moves, endlessly repeated across doctrinal fields; to show that they are all in conflict with one another and that they can all be drawn upon in the analysis of every case. So too with policy arguments: policy is not a way out of doctrinal indeterminacy and contradiction, but just a gate of entry into a new kind of indeterminacy and contradiction.

Now for purposes of practical pedagogy, we might at this point have gone far enough. We have given the students a systematic inventory of the arguments available and some training in their use. This is of obvious value for equipping students for adversary advocacy or just for helping them see the diversity of possible legal and policy conclusions that may reasonably be drawn out of the same factual situations. It gives them, at the least, more suppleness and flexibility than can be derived from teaching the law as an authoritative set of solutions. Of course, it could teach them that since the system supplies no right answers, they will be justified in making as much money as they can pushing whatever arguments benefit the client of the moment. But it could also teach, as it ought to do, that there can be no absolution from doing bad things as a lawyer simply by virtue of the fact that one has been acting out a role within the system. If the system is open-ended, if its

12. See for example the debate between Ackerman (Yale) and Komesary (Chicago) on housing code warranty enforcement in Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies, and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971).

operations always involve selection from among contradictory moves, there is always some possibility of choice and, therefore, always responsibility for the choices actually made. We say, essentially, there are no solutions, only arguments. And maybe that is all there is time for in a first year course.

Understandably, however, few CLS teachers are content with this stopping point. First, because, as yet, they will not have done anything to describe or explain the conventional selections among the contradictory alternatives that the current legal system does seem recurrently to settle on; and even if one does not feel one has to *justify* those selections, one ought to try to account for them. Second, because the CLS teachers will not have filled out the unconventional alternatives to the going system in enough detail to make them plausible to law students who, like most people, certainly most lawyers, are strongly attracted to the authority of going practices, to the normative power of the actual. A conscientious CLS classroom practitioner should have something to say about both, or risk ending up in the morally dubious position of conveying that law is only a chaos full of plausible arguments for any side, and it does not matter how you come out.

CLS teachers generally agree that one of the basic techniques the legal system uses to extract the appearance of order from multiplicity and contradiction is that of regularly privileging one pole of each of its contradictory poles over the others. In contract law, for instance, the preferred poles even today are those of rules over standards, formal signs of intent over informal signs, individualism over communitarianism, *ex ante* risk allocation over *ex post* loss-sharing, *ex ante* bargaining over relational reliance, and so on. The suppressed poles never disappear: indeed they are fully present as potential sources of argument in every case, but they are considered of lesser legitimacy, to be invoked only in marginal or deviant circumstances as equitable exceptions to the normal rule of law. So one way of exploring with one's students alternative social arrangements to those we are currently used to is to ask what a piece of the world would look like if it were arranged more in accordance with the legal-political vision of the suppressed pole than of the privileged pole. In this exercise it helps to provide students with descriptions of real social practices or experiments that actually do express the implications of the alternative vision. In Contracts this turns out to be simple because the actual practices of business firms in continuing commercial relations in many ways much more

closely resemble the suppressed informal-communitarian vision of contract law than they do the privileged hardboiled neo-Hobbesian vision. Other examples I have seen in CLS class materials are Gerald Frug's materials on Local Government Law,¹³ which examine ways of making local governments more democratically responsive; or my colleague William Simon's materials on Corporations, which contain a large section on the theory and practice of worker-managed cooperatives.

In all these classes the technique is to examine some practices that would seem to realize a more democratic, egalitarian, solidary vision of social life, but that conventional wisdom condemns as naive or silly or deviant or impractical; to show that the normative justifications for such practices are already immanent in the conventional wisdom itself, only hidden from view; and finally to show that here and there in actual social operation there are some experimental examples that suggest how these partially suppressed other readings of the legal system might be more widely vindicated.

Let me give an example, necessarily cut short because of time pressure. Suppose the following situation: a worker tending a machine is told by her supervisor to perform an operation that she believes to be unsafe; and she is fired. Let's talk about how we might go about analyzing her claim. Let's put aside for a moment all the possible schemes of statutory or administrative regulations of work safety, OSHA, state OSHA, and the like; and also suppose that there is no collective agreement that governs the situation or union to intervene. Let's also put aside remedies, if the claim is "valid—such" as reinstatement, damages, punitives, criminal sanctions—and concentrate for the moment solely on the legal validity of the claim in a common law world. Now if you put this case to lawyers and law students, I have found, you generally find some expressions of sympathy for the employee, but, unless there is some special regulation or union contract, the instinctive reaction is that she does not have a claim. Why? The details would vary among jurisdictions, but the principles I suppose would be loosely something like this: the decision making authority to control how work is performed is with employers, and if employees disobey they can be disciplined or dismissed. Why? Sometimes people just shrug and say, "Well, that's capitalism, that's the system we have."

13. Recently published as G. FRUG, *LOCAL GOVERNMENT LAW* (1988).

This type of response is fairly labeled as mindless conceptualism—an area of social life is swept into a category, and then an inescapable package of consequences is attached to membership in the category: great issues of morals and political economy are settled with a definitional stop. Clearly, this will not do. Let's break this case down a bit more into its broad legal-doctrinal components. The main ones will be supplied by property and contract law.

Property: the employer is the owner, or agent of the owner, of the productive resources; he is entitled to say what happens on his property, to condition access to his resources, and to expel people, invoke the trespass sanction, if the conditions are violated. "Do as I say on my property or get off."

Contract: there may be an express contract between the parties, though there probably is not, that gives a job description and says that employees shall follow employer's directions and can be dismissed for insubordination. More likely, the legal system will handle this through implied contractual terms of several kinds: employment, unless otherwise agreed, is at will, and employees can be fired for any reason or no reason. Or—since common law has come somewhat to soften this rather stark regime—the reasoning could be that the employee's refusal to follow orders is always sufficient cause for discharge since by taking on the job she has agreed to submit to the ordinary rules of the workplace, whereby employers have the authority to control the work and fire for insubordination.

The contract/property arguments will, finally, be bolstered by arguments from tradition and policy. Tradition: the customary allocation of final judgment over issues of work safety is with employers. Policy: and what is more, it should remain with employers because efficiency in production is best served by hierarchical and centralized coordination of work tasks.

Now the main thing one can strive to do as a CLS teacher is to subject this set of reasons—the instinctive conventional reasons why the worker does not have a claim—to some analysis to generate some counterarguments.

Take the Property claim: property is sovereignty. That looks a little less plausible when you remember that property rights are never absolute, but can be qualified or give way before other people's rights if their exercise causes or threatens to cause harm, and

there the exercise of a property right arguably exposes the employee to an unreasonable risk of physical danger. Even the right, supposing one has it, to kick people off your property for any reason at all does not imply the right to impose any indignity you please as a condition of their remaining: this is made plain in a dozen areas of law, from that of unconstitutional conditions,¹⁴ to the law of duress.¹⁵ More globally, is it even clear in the first place that property principles allocate the right of plenary control over the work task to the employer? The standard traditional rationales for property rights actually make this very unclear. There are efficiency rationales—allocate resources to their highest and best users—but let me defer these for a minute. There are also autonomy, security, self-expression, and republican-independence rationales—that the function of private property is to make possible the fullest possible development of individual faculties, free of the incursions of others or the state, and to create independent citizens, free of dependence on or domination by others. It is not hard at all to argue, as many have indeed done, from those premises that effectively realizing the premises behind property rights in the circumstances of modern specialized and bureaucratic industrial work organization requires creating a worker's property rights in the job, such as some security against firing and some authority over design and execution of work tasks.¹⁶ Nothing in the common law says that property rights have to be permanently vested in a single class of users—they are always being shifted around to different users as social circumstances change, and of no property is this more true than of property in the corporation. So when a court says—as even in this post-Realist era courts sometimes still do¹⁷—“It's the employer's property, therefore he can fire for refusal to work,” you know it has fallen into conceptualist fallacy or simple circularity: it has actually *allocated* the property right and then claimed to have *deduced* it.

Now take the Contract claims. If there is an express contract, the claim is that the employee consented to its terms when she

14. See Sullivan, *The Supreme Court-Comment, Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

15. See Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894). (“It does not follow that, because you can legally do the threatened harm, you can use the threat.”)

16. See, e.g., Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986).

17. See J. ATLESTON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983), for many examples of the conceptualist and circular uses of the property trope.

took the job; so too if the terms are implied. But check this against ordinary contract principles. Such a deal certainly looks like a kind of contract of adhesion, take-it-or-leave-it terms imposed on a party who may have very little practical choice (are there lots of other jobs in the economy that would give her more control over work?); and we know legal doctrine looks on one-sided terms in adhesion contracts, even in the consumer setting where people can much more easily exit and contract elsewhere, with beady eyes.¹⁸ Contract law comes down especially hard on terms that require one contracting party to surrender to another a large discretionary authority to control a large piece of her life and resources.¹⁹ In other contractual settings, such as requirements-contracting settings, the courts would view such ample general powers in one party over another as far too permissive of possible exploitation and, thus, unenforceable.²⁰ Anyway, even if the employee could be taken to have consented in advance at a very general level, such general consent, again following ordinary principles of contract interpretation from other settings, would not usually imply consent to a very specific order to engage in a dangerous practice. Ordinary duress doctrine is full of examples of threats far less coercive than the threat to fire that have been held to negate true "consent" to an agreement.

So our doctrinal discussion, as usual, is going to point in lots of different directions; and the normal way out is through policy argument, which would maybe explain why employer parties to employment contracts seem to be given so much more implied authority over the governance of the contractual relation than are parties to other contracts. The kinds of policy reasons that are usually advanced—and again, one normally has no trouble getting students to volunteer such reasons—come from tradition (or history), convention (or custom), and efficiency. This is the way it has been; the way it usually is; and this is the way for utilitarian reasons that it should be—much as we may regret the unhappy fallout in some individual cases of employer bad judgment.

Let's talk briefly about all of these. First let's consider history.

18. E. FARNSWORTH & W. YOUNG, *CASES & MATERIALS ON CONTRACTS* 364-72 (4th ed. 1988).

19. For many examples, see Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

20. See FARNSWORTH, *supra* note 19, at 301-12.

It turns out that both the employment-at-will rule and the employer's extensive legal authority to control the design and execution of work tasks are of fairly recent historical origin and were fiercely disputed and contested when they were imposed. The traditional legal relation contemplated that craft artisans would make a product according to the standards of their craft and deliver it to contract specifications to the factory manager—the relation was much more like that of an independent supplier to its customers. As late as the 1890s in the steel industry, for example, the entire production process, at every stage, was under the control of craft workers: it took a revolution in the organization of work, backed up by Pinkertons and federal troops in some incredibly bloody struggles, for employers to assert control at the point of production.²¹ The employer's control doctrine was a foreign import from another social-legal context entirely, not manufacturing, but rather from the master-servant relations of the pre-industrial patriarchal household.²² Until about 1900, in fact, employment and domestic master-servant relations were handled in the same treatises as comparable relations requiring comparable regimes of authority and subordination.²³ What sort of a legal tradition is that, one may ask, to govern social relations in a modern liberal society?

When you look at arguments from custom—this is how authority is usually allocated—the argument is similarly problematic. The “Fordist” top-down hierarchical model of factory labor management has been the norm only in a few specific contexts, and even there more a norm than a reality since the practical conditions of modern specialized production have demanded restoration of much of the craft autonomy that was destroyed at the end of the last century. Thus, in recurring factory contexts, knowledge of the machines is local, firm- and machine-specific craft knowledge; only the workers have it, and as a practical matter their expertise on how the machines behave must be, and is, deferred to. Official

21. See Stone, *The Origin of Job Structures in the Steel Industry*, in ROOT AND BRANCH: THE RISE OF WORKERS' MOVEMENTS 123-58 (1975); see generally R. EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* (1979); D. Montgomery, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925* (1987).

22. See P. SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* (1969); C. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA 1880-1960* (1985).

23. See, e.g., J. SCHOULER, *A TREATISE ON THE LAW OF DOMESTIC RELATIONS* (4th ed. 1895).

direction or interference is simply ignored.²⁴ Legal generalizations about how the factory *must* work are often nothing more than inventions pulled from the ideological fantasies of Taylorist managers.

The big arguments are the efficiency arguments. These are, at first glance, rather odd. In any other context, who should decide how safe the machine is? As a matter of general tort or contract policy analysis, how should one allocate the authority to decide? Wouldn't one ordinarily allocate it to the party in the best position to estimate and control the risk—here, clearly the worker with machine-specific knowledge—and to avoid it? If you want sensible decisions as well as unmaimed workers, isn't that the way to do it? Even at the height of its solicitude for employer prerogatives, the common law gave employees a privilege to disobey orders that posed serious risk to life or limb;²⁵ and the common arbitrator's maxim of "Work first, grieve later" is commonly qualified by an exception for hazardous activities.²⁶

Nonetheless, in both general common law decisions and in grievance arbitration, there is an incredibly strong bias against giving workers discretion to refuse work, save in situations where hindsight will reveal the danger is objectively both enormous and surprising—routine dangers are normal workplace risks. Overwhelmingly, the rationale behind the bias rests on arguments about the need for employer control and employee subordination to maintain discipline and continuity of production. Some of these are globally general arguments about the need for hierarchy in the direction of work—they assume that a top-down chain of command, with strict rules and fiat authority, is essential to coordinate specialized work processes, avoid arguments, and execute quick decisions and that the benefits of hierarchy as a whole outweigh the costs of occasional arbitrary decisions. As such, the argument is much too broad, as German and Japanese work practices have been teaching the world for some time, and American plant managers who finally are being weaned from the Fordist model are finding out.²⁷ Hierarchy is often inefficient because it engenders re-

24. See P. DOERINGER & M. PIRE, *INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS* (1971); C. SABEL, *WORK AND POLITICS: THE DIVISION OF LABOR IN INDUSTRY* 59-77 (1982).

25. H. WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* 285 (1981).

26. *Ford Motor Co.*, 3 Lab. Arb. Rep. (CCH) 779 (1944) (Shulman, Arb.).

27. For accounts of some of the new worker-involvement-focused systems, see C. Heckscher, *Democracy at Work: In Whose Interests? The Politics of Worker Participation*

sentment, low morale, resistance, and sabotage; so you have to hire another costly level of intermediate monitors to make sure the workers are following orders. It is often a lot cheaper to delegate broad decisionmaking discretion to the workers and let them figure out how best to design and execute the work.²⁸

The argument for continuity at any cost has been, one would think, adequately refuted by the long and grisly history of assembly-line injuries. Anyway, modern mass production techniques, at least in theory (the reported practice is a lot less inspiring), do not fetishize continuity even on the assembly line, but let workers who fall behind or risk injury pull the cord to stop the line. The real fear is that the right to refuse dangerous work will render employers, as Judge Posner put it in a recent opinion, "powerless to deal with [workers] who, simply by alleging a hazard to safety and health, claim a privilege to walk off the job without notice" and, thus, "make it impossible to maintain discipline" in the workplace.²⁹ The imagery of anarchy, chaos, and lawless disorder is all over arbitrators' decisions. The fear amounts to this: that given an entitlement, the workers will have the power to abuse it, to behave strategically, to extort rents and concessions from their employers, to feign danger as a tactic.³⁰ But that is just an argument against giving anyone a legal right to anything; it is just as true of the employer's entitlement to fire people, which can be abused to fire them for bad reasons.

Finally there is the institutional-competence move: punt to the legislature. Everything we have said may be completely sound and convincing as a matter of justice and sound policy, but it involves a major change in the ground rules, and such changes are for legislatures to make, or perhaps administrative agencies such as OSHA. Now I do not have any particular biases in favor of having judges rather than legislators or administrators make law, but this argument has always seemed more than a little mystifying to me. Common-law courts are important lawmakers in our system. They have long had a major share in framing the ground rules of eco-

(1981) (unpublished Ph.D. dissertation, Harvard University).

28. See generally A. Fox, *BEYOND CONTRACT: WORK, POWER AND TRUST RELATIONS* (1974) S. BOWLES, D. GORDON & T. WEISSKOPF, *BEYOND THE WASTELAND: A DEMOCRATIC ALTERNATIVE TO ECONOMIC DECLINE* (1983); C. SABEL, *WORK AND POLITICS* (1982).

29. *Miller v. Federal Mine Safety & Health Rev. Comm'n*, 687 F.2d 194, 196 (7th Cir. 1982).

30. The argument seems overstated on its narrow terms: at some point the worker will have to show there really was a danger, or that he reasonably thought there was.

conomic conflict, and over time they have busily engaged in changing the rules, inventing new torts and abolishing old ones, inventing employment-at-will and then sabotaging it, freely changing standards of liability and remedies for breach. Why should this particular moment be the moment for the court to dig in its heels and say, thus far and no further? Especially since in this area there *has* been a lot of statutory and administrative action in recent years, most of it in the direction of giving employees a privilege to refuse dangerous work, and immunity from dismissal or discipline for exercising it; and it has been the practice of post-Realist lawyers to look to recent legislative action as a source of trends and guiding norms for the common law itself.³¹

I do not mean that all of these counterarguments necessarily overwhelm the conventional arguments the other way, that they are all clinchers and will persuade everyone in the teeth of contrary convictions. I just want to illustrate the conservatizing power of so much legal discourse and how illegitimate that power is—there are plenty of resources in perfectly ordinary legal and policy analysis, in the doctrines of private property and free contract, to generate some strikingly alternative legal regimes of, in this instance, workplace relations. You do not even have to argue for new *regulation* of workplace relations, or talk about *intervention* into workplace relations: we are talking here about the basic legal constitution of workplace relations, the ground rules of a free-market system based on private property and free contract, and how those ground rules could be pushed, perfectly consistently with the system's major premises, towards being very different from the way they now are.

We still have a long way to go in producing teaching materials and techniques and examples that will carry out the insights of this method. As a teacher in a school where almost every one of the students goes on to big-firm, big-city corporate practice, I do not think CLS will succeed on its own terms until it has developed resources that will enable left-liberal students—who as of now believe they must abandon all their progressive political ideas if they

31. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). A number of recent cases have, in fact, used the statutes to imply a right of action in favor of "at will" employees fired for refusing dangerous work, on the grounds that such plaintiffs are vindicating the "public policy" behind safe workplaces; however, other courts have refused to qualify "at will" firing for this reason and none has been willing to refashion the implied contract of employment, apart from statute, to recognize the privilege.

enter corporate practice—to work in modest ways to reform such practices, by which I mean reducing hierarchy in firm working conditions as well as encouraging their corporate clients towards socially responsible conduct in routine practice settings and engaging in public interest causes outside regular practice. This means, as a bare beginning, that we have to develop good descriptive materials on what it is that business lawyers in various practice settings actually do—something, incredibly, that law teachers have never had—and out of those materials some practical suggestions about what can be done and how to do it.

So in the end, what teaching CLS is all about, or ideally ought to be about, is empowering students to read multiple interpretations, multiple alternative institutions and practices, and multiple possible directions, out of a legal order that is too often presented as complacently or tragically frozen into a unitary system and course of development. It is about teaching students to recognize the larger political visions buried in the most technical arguments of doctrine and policy, and to debate these visions openly. (I am quite convinced, incidentally, that CLS teachers who are sometimes accused of proselytizing in the classroom actually expose their students to a much wider range and diversity of political views than do most traditional-doctrinal or law and economics teachers.) Of course, nobody with any sense thinks the legal system is infinitely malleable, stretchable in any direction one pleases at any time. It is always surrounded by the constraints of entrenched powers, customary inertia, reliances on sunk costs and existing expectations, and fear of the unknown. But to impart, through one's teaching, some hope of movement towards a more egalitarian society by pushing at the possibilities already inhering in our familiar legal arrangements—that is worth trying to do.

